Supreme Court No. 836604
Court of Appeals No. 36944-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY L. JACKOWSKI and ERI JACKOWSKI, husband and wife,

Appellants,

vs.

DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors; HIMLIE REALTY, INC., VINCE HIMLIE, broker for Windermere Himlie Real Estate, real estate brokers, and ROBERT JOHNSON and JEFF CONKLIN, real estate agents,

Respondents.

AMICUS CURIAE MEMORANDUM IN SUPPORT OF HAWKINS POE, INC.'S PETITION FOR REVIEW

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I. NATURE OF THE CASE AND DECISION

This appeal arises out of the trial court's entry of summary judgment in favor of Petitioner Hawkins Poe, Inc. ("Hawkins Poe"), and its dismissal of Appellants Timothy and Eri Jackowski's (the "Jackowskis") tort claims for breach of statutory and common law duties. On June 16, 2009, Division Two of the Washington Court of Appeals reversed the trial court, holding that the economic loss rule does not apply to tort claims against real estate licensees. Amicus Washington REALTORS® ("REALTORS®"), a statewide trade association of approximately 20,000 real estate licensees, files this memorandum in support of Hawkins Poe's petition for review of Division Two's opinion. The legal principles announced in the opinion are an unprecedented and expansive departure from the decisions of this Court, and will result in far-reaching unintended consequences for the State's real estate licensees and the consumers they serve.

II. ARGUMENT

A. REVIEW IS NECESSARY UNDER RAP 13.4(b)(4) BECAUSE DIVISION TWO'S DECISION INVOLVES ISSUES OF SUBSTANTIAL PUBLIC INTEREST.

This Court repeatedly has held that a policy of providing tort remedies for wrongful acts must yield where purely economic loss occurs in a commercial context, because tort claims would otherwise become a tool to undermine the sanctity of contract. Attempts to circumvent the economic loss rule through creative distinctions, or by inventing new

categories of tort claims, have been uniformly rejected because "[t]he dangers in creating such unreasoned precedent are manifest." *See, e.g., Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987) ("In its effort to find recovery for the plaintiffs, the trial court formulated a theory of recovery in negligence that overlooks the intricacies and logical inconsistencies inherent in the approach.").

Division Two's opinion in this case ignores the manifest dangers this Court warns of in its prior decisions. By creating a new exception to the economic loss rule, Division Two's decision will adversely affect the reliability of residential real estate purchase and sale agreements, and will undermine the strong public policy of encouraging and enforcing bargained-for contractual remedies. Thousands of real estate purchase and sale agreements are executed each year in the State of Washington, in which parties allocate, or have the opportunity to allocate, the risk of loss between one another The decision renders those agreements illusory, and places real estate licensees in the untenable position of being de facto guarantors of transactions. The effect of these changes will be increased uncertainty and cost to consumers, professionals, and businesses throughout the state.

1. THE DECISION HAS SIGNIFICANT UNINTENDED CONSEQUENCES THAT UNDERMINE ALL REAL ESTATE PURCHASE AND SALE AGREEMENTS.

This Court has held that a party who breaches a duty arising in a real estate transaction may be subject to contractual claims and remedies, but will *not* be liable in tort for purely economic loss. *Alejandre v. Bull*,

159 Wn.2d 674, 684, 153 P.3d 864 (2007) ("[I]n this state, the economic loss rule applies to tort claims brought by homebuyers."). This distinction promotes meaningful allocation of risks that arise in a commercial transaction. For similar reasons, this Court has also held that parties are barred from raising tort claims for purely economic loss against construction companies, architects, engineers, and inspectors. *Stuart*, 109 Wn.2d at 420; *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994). But if Division Two's opinion in this case is allowed to stand, the allocation of risk between parties in real estate purchase and sale agreements becomes virtually meaningless.

The effect of Division Two's decision on the reliability of risk allocation can readily be demonstrated by a fairly common factual scenario: Suppose a real estate buyer requests that the seller include a warranty covering any defects in the on-site septic system (the type of risk allocation encouraged by the *Alejandre* court) but the seller rejects the request, and will only sell the property as-is. The buyer then accepts the counter-offer, so the parties have consciously allocated the risk of septic system defects to the buyer. After the transaction closes, the buyer discovers that the system is indeed defective, and suffers economic loss as a result. Notwithstanding the conscious contractual allocation of risk,

under Division Two's ruling, the buyer may sue their agent for alleged negligence in rendering one or more of the buyer's agency duties as defined in RCW 18.86.050. Such a claim rewrites the terms of the contract and awards the buyer a benefit that it failed to obtain (or pay for) in the contract.

The bargained for allocation of risk for post-closing economic loss described above results from exactly the type of commercial behavior that *Alejandre* encourages. But Division Two's decision eviscerates the legal effect of that behavior. If the decision stands, any party that is dissatisfied with the bargain it strikes may simply circumvent its deal by suing a real estate agent for "professional negligence" for not advising the plaintiff to avoid the purported loss. Such a result violates a fundamental purpose of the economic loss rule, which is to "prevent[] a party to a contract from obtaining through a tort claim benefits that were not part of the bargain." *Alejandre*, 159 Wn.2d at 683.

2. THE DECISION TRANSFORMS REAL ESTATE LICENSEES INTO DE FACTO GUARANTORS OF TRANSACTIONS.

Unless Division Two's decision is reversed, all parties involved in a real estate transaction will be immune from tort claims except the real estate licensee. As a result of that distinction, agents are transformed into *de facto* guarantors' of the parties' contractual satisfaction. They will face

increased litigation, both as to unique tort claims and as "add-on" defendants to breach of contract suits. This Court applied the economic loss rule in the *Stuart* case to prevent exactly this type of unfair exposure. *Stuart, supra,* 109 Wn.2d at 421 ("Imposition of tort liability upon the builder-vendors would require them to become guarantors of the complete satisfaction of future purchasers.").

Once again, a common scenario demonstrates the manifest dangers that result from Division Two's decision. For example, in the present case, the claim against Hawkins Poe arises under RCW 18.86.050(1)(c), for its alleged failure to advise the Jackowskis to seek the advice of a geotechnical engineer. But if Hawkins Poe had referred the Jackowskis to a geotechnical engineer, that engineer would be immune from any negligence claims arising from its professional work. *Carlson v. Sharp*, 99 Wn. App. 324, 994 P.2d 851 (1999). To hold a real estate licensee liable for purely economic loss on the theory that the licensee could have avoided the loss by counseling the client to seek expert advice is patently inequitable; particularly where an actual referral to an expert would not result in any liability to the expert for his failure to avoid the loss.

In another example, under another recent decision by Division Two in *Cox v. O'Brien*, 150 Wn. App. 24, 206 P.3d 682 (2009), a buyer is barred by the economic loss rule from raising claims against the seller for

intentional misrepresentations. But under Division Two's ruling in this case, that same buyer would still have a claim against the seller's licensee for negligent misrepresentation. If the buyer has no claim against the seller for *intentional* misrepresentation, it is nonsensical to suggest that the seller retains a claim against the selling licensee for *negligently* failing to discover the seller's fraud. The common law duty to refrain from committing intentional torts surely is no less compelling than a real estate licensee's statutory duty of care.

The facts of this case demonstrate only one of a myriad of adverse consequences that will result from the Division Two's decision. As a practical matter, every single real estate purchase and sale agreement executed in the State of Washington will be undermined by this decision. It creates uncertainty in contracting and increases costs for real estate licensees–costs that ultimately will be passed on to consumers. It is also fundamentally unfair to real estate licensees, who have been placed alone in a special class, distinct from anyone else involved in a real estate transaction, as well as other licensed professionals who are not subjected to the same exposure in performing their professional duties.

B. REVIEW IS NECESSARY UNDER RAP 13.4(b)(1)-(2) BECAUSE DIVISION TWO'S DECISION IS CONTRARY TO EXISTING PRECEDENT.

1. DIVISION TWO'S OPINION IGNORES CONTRARY AUTHORITY THAT HOLDS THERE IS NO PER SE LIABILITY FOR VIOLATION OF A STATUTORY DUTY.

Division Two's decision purportedly creates a new cause of action under RCW 18.86, although the statute itself neither provides for nor contemplates such a claim. To the contrary, the statute merely defines the scope of duties owed by a real estate licensee, and does not otherwise alter the common law. *See* RCW 18.86.110. Because RCW 18.86 only affects duties, there was no need for the Legislature, or the Court of Appeals, to create a new cause of action; claims existing at common law remained undisturbed.

Like most statutory duties, to the extent Hawkins Poe owed duties to the Jackowskis under RCW 18.86, a violation of those duties would constitute evidence of the breach element of a negligence claim, but would not establish negligence *per se* or become a separate claim. As RCW 5.40.050 provides:

> A breach of a duty imposed by statute, ordinance, or administrative rule *shall not be considered negligence per se*, but may be considered by the trier of fact as evidence of negligence . . . .

(emphasis added). Thus, breach of a statutory duty is admissible, but not in itself sufficient, to prove negligence. *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 684, 990 P.2d 968 (2000). Division Two's opinion is inconsistent with RCW 5.40.050 and the cases interpreting it to the extent the opinion holds that a violation of RCW 18.86 automatically creates

liability, independent of the common law, where no cause of action is stated in the statute.

2. DIVISION TWO'S OPINION DOES NOT APPLY EXISTING AUTHORITY FOR IMPLYING A CAUSE OF ACTION.

This Court has adopted a three-part test to determine whether a statute impliedly creates a cause of action: 1) whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; 2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and 3) whether implying a remedy is consistent with the underlying purpose of the legislation. *See, e.g., Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

Division Two's opinion does not analyze RCW 18.86 under this rubric. Instead, it merely presupposes the existence of a statutory cause of action. But an analysis of the factors indicates that a private right of action should not be implied.

For example, although RCW 18.86 does not include an independent cause of action, it does contain a remedial administrative enforcement provision, subjecting licensees to disciplinary proceedings. RCW 18.86.031; RCW 18.85.230. Washington courts have already held that there is no private right of action for claims arising out of conduct that violates RCW 18.85.230. *Woodhouse v. RE/MAX Northwest Realtors*, 75 Wn. App. 312, 316-17. 878 P.2d 464 (1994) ("[T]he Act by its terms establishes only a professional conduct code, and a public disciplinary remedy for violations of that code. This is not the equivalent to a private

right of action, which if it chose to, the Legislature could enact.") (emphasis added). Moreover, the Legislature knows how to create a private cause of action when it intends to do so. *See, e.g.,* RCW 19.86.090 (authorizing aggrieved parties to "bring a civil action" for violations of chapter 19.86).

Here, the Legislature enacted RCW 18.86 after the decision in the *Woodhouse* case, but it did not include an express cause of action. Instead, as with RCW 18.85, the Legislature only included a public disciplinary remedy for violations of a licensee's duties under RCW 18.86. RCW 18.86.031. As such, Division Two's holding that RCW 18.86 creates a new cause of action is inconsistent with *Woodhouse. Accord Braam v. State*, 150 Wn.2d 689, 712, 81 P.3d 851 (2003) ([W]e find... that implying [a cause of action in RCW 74.14A.050] is inconsistent with the broad power vested in DSHS to administer these statutes.").

Rather than to perpetuate the *ad hoc* process by which real estate licensees duties had been developed at common law, the intent of the legislature in enacting RCW 18.86 was to clarify and limit the scope of licensees' duties to the public. *See, e.g.,* 8 Stoebuck and Weaver, *Washington Practice Series, Real Estate: Property Law* § 15.5-15.10 (2d ed., 2004); RCW 18.86.040 - .060. Division Two never addressed this crucial element in its opinion. There are consequences for a licensee's violation of the duties in RCW 18.86, but they do not include exposure to an implied statutory cause of action or automatic liability on a private common law claim.

III. CONCLUSION

In Washington, "[w]e hold parties to their contracts." *Berschauer/Phillips*, 124 Wn.2d at 823. Here, Division Two deviated from this directive by creating a new exception to the economic loss rule that will have a substantial impact on the public interest in all real estate transactions, and which is contrary to the long line of Washington appellate cases that have sought to put an end to plaintiffs' attempts to recover in tort what they failed to bargain for in their contracts. The decision should be reversed.

DATED this 29th day of September, 2009.

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